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**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	MM Docket No. 98-175
Amendment of Section 73.606(b),	)	RM-9364
Table of Allotments, Television	)	
Broadcast Stations and	)	
Section 73.622(b), Table of Allotments,	)	
Digital Television Broadcast Stations	)	
(Buffalo, New York).	)	
	)	

**REPORT AND ORDER  
(Proceeding Terminated)**

**Adopted: July 14, 1999****Released: July 23, 1999**

By the Chief, Allocations Branch:

1. At the request of Western New York Public Broadcasting Association ("petitioner"), licensee of Stations WNED-TV, Channel 17, and WNEQ-TV, Channel \*23, Buffalo, New York, the Commission has before it a Notice of Proposed Rule Making<sup>1</sup> ("NPRM") proposing amendment of the Television Table of Allotments to reflect Channel 17 as reserved for noncommercial educational use, and Channel 23 as nonreserved. The NPRM also proposed that the DTV Table of Allotments for Buffalo be amended to reflect a similar change for Channel 17's companion DTV channel, Channel 43 and Channel \*23's companion DTV channel, Channel \*32. Petitioner filed comments in support of the proposal. Grant Television, Inc. ("Grant") licensee of WNYO-TV, Buffalo, New York, WKBW-TV Licensee, Inc. ("WKBW"), licensee of Station WKBW-TV, Buffalo, New York, Kevin Smardz, President of Southtowns Christian Center, Lakeview, New York, and Coalition for Noncommercial Media ("CNM"),<sup>2</sup> a group of Buffalo-Area citizens and WNED/WNEQ-TV viewers, filed comments in opposition.

2. In support of its proposal, petitioner states that as a result of the proposed changes, petitioner will be able to provide an enhanced operation at its primary and 40-year-

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<sup>1</sup> 13 FCC Rcd 18803 (1998).

<sup>2</sup> CNM also filed a "counterproposal" requesting that the Commission amend the TV Table of allotments to reserve all unreserved channels being used for noncommercial operation. This proposal is not mutually exclusive with the Buffalo proposal and is therefore not appropriately filed in this proceeding. We will not consider this proposal further.

old public television Station WNED-TV on reserved Channel \*17. Petitioner states that it intends to sell its Station WNEQ-TV on an unreserved Channel 23 to a commercial entrepreneur and dedicate the proceeds of the assignment of license of that station to a trust for the maintenance and improvement of Station WNED-TV. Petitioner states that both its Board of Trustees and Community Advisory Board have unanimously voted in favor of this proposal, and its members have also voice strong local approval for this project.

3. Petitioner claims that since Station WNED-TV on Channel 17 is the station in the Buffalo viewing area that most viewers and members recognize as the "mainstay" of public television broadcasting, it should be retained on reserved Channel 17. Furthermore, Station WNED-TV is long-established, is the more powerful of the two stations, has a more extensive signal reach, and is technically more advanced.<sup>3</sup> In addition, petitioner notes that continuation of effective operations on Station WNEQ-TV Channel 23 has been an expensive and unproductive enterprise. Funds and resources have been drained from Station WNED-TV and it has been difficult to program Station WNEQ-TV, Channel 23 on any extended hourly basis. Because of cost constraints, Station WNEQ-TV Channel 23 operates only eight hours a day. It has been utilized primarily for certain programming which would not normally appeal to most of the viewing audience for Station WNED-TV. Petitioner also states that it expects the cost of digital conversion for both stations to be prohibitive, and that converting two stations yielding eight channels makes neither economic nor programming sense. It further claims that significant improvement in public broadcasting for the Buffalo region cannot realistically be achieved without the infusion of a substantial new funding source made possible by the proposed endowment after the reserved channel change.

4. Petitioner states that retention of Station WNED-TV on a reserved channel is in the public interest because the endowment fund it will create from the sale of Station WNEQ-TV will raise Station WNED-TV to the position of a major television producer, and enable it to acquire additional programs. The additional funding will also allow Station WNED-TV to include enriched educational community outreach services. In addition, petitioner states that the endowment fund will defray the costs associated with converting Station WNED-TV to digital broadcast service by 2003. Following digital conversion, petitioner states that Station WNED-TV will be increased from one channel to four and special receivers will enable viewers to select from among a menu of programs it broadcasts. Petitioner states that it enjoys state-of-the-art production facilities, and, through its endowment fund, programming on Station WNED-TV may be marketed through diverse broadcast and non-broadcast sources.

5. Grant and WKBW argue that if the Commission grants the proposal, it will be dereserving Channel 23. They argue that the Commission should then open unreserved Channel 23 to competing applications, citing the *Sixth Report and Order* in Docket Nos.

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<sup>3</sup> Station WNED-TV operates on Channel 17 with 2510 kW at 330 meters HAAT while Station WNEQ-TV operates on Channel 23 with 950 KW at 314 meters HAAT.

8736, *et al.*, 41 FCC 148, 212, n. 51 (1952). WKBW argues that once opened for applications, the channel should be auctioned so that the U.S. Treasury will benefit from the sale of the commercial spectrum, not private parties. Grant argues that competing applications are required because this proposal does not qualify as a channel swap under Section 1.420(h) of the Commission's rules. CNM argues that dereserving any reserved television channel to allow the sale of the station as a commercial entity is *per se* against the public interest, and that the Commission should summarily deny any such request.<sup>4</sup> Petitioner responds that the proposal does not involve a dereservation because the total number of reserved and nonreserved channels licensed to the community will remain the same. It also notes that commercial competitors have benefitted for many years from the fact that Station WNED-TV has been operated as a noncommercial enterprise because they have been relieved of the competition that station otherwise would have provided had it been operated commercially.

6. Smardz argues that the proposal is not in the public interest and should be denied because petitioner's public representations regarding the viability of Station WNEQ-TV and its programming objectives for both Stations WNED-TV and WNEQ-TV both during its tenure as licensee and in connection with the instant proceeding seem false or at least implausible. Smardz also questions whether petitioner should be allowed to profit from the sale of Station WNEQ-TV as a commercial entity because it may have received government monies to develop or operate that station.

7. Finally, parties argue that the community of Buffalo continues to need a second NCE television station. WKBW claims that it serves an important function in the community by providing 56 hours of unique noncommercial programming every week. CNM states that the Commission should absolutely decline to dereserve any public television channel if the dereservation would result in the loss of a public television station. Petitioner responds that a blind adherence to preservation of the *status quo* is counterproductive and would discourage innovation and creativity in the public broadcast field at a time when new and imaginative solutions to the problems facing the industry are needed most. Petitioner notes that requiring all second channel stations to remain as public television stations by rulemaking is contrary to the current state of the public broadcasting industry which is trying to discourage unnecessary

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<sup>4</sup> CNM claims that this situation should be analogized to the reservation of land for a national park, and claims that the government would never reserve land adjacent to a national park and simultaneously dereserve the parkland to allow the construction of a mall or other commercial entity. CNM is wrong in this argument. 16 USC § 4601-8(f)(3) specifically provides for a process termed "conversion" of property acquired or developed with government assistance under the Land and Water Conservation Fund Act:

The Secretary shall approve such conversion only if he finds it to be in accord with the then existing comprehensive statewide outdoor recreation plan and only upon such conditions as he deems necessary to assure the substitution of other recreation properties of at least fair market value and of reasonably equivalent usefulness and location. 16 USC § 4601-8(f)(3) *See also*, *Sierra Club v. Davies*, 955 F.2d 1188, 1194 (Eighth Cir. 1992).

overlap of duplicating stations, to foster increased efficiencies of production and operation and to encourage mergers, consolidations and other arrangements designed to halt the number of stations offering duplicative programming and to assure the long-term viability of the industry.

8. We will grant the proposed change of reservation. Our decision in this matter turns on two principal issues. First, is the proposed exchange of reservation in the public interest, and second, can the exchange be effectuated under the Commission's existing rules and policies? We believe the answer is yes to both. First, we believe that the exchange is justified by our authority pursuant to Section 316 of the Act to modify a station's license if, in the Commission's determination, it will further the public interest, convenience and necessity. Granting the proposal as filed will further these goals in many aspects. The community of Buffalo will benefit from the continued operation of noncommercial educational television service on Station WNED-TV, clearly the more powerful, broad reaching of the two stations. Petitioner could sell Station WNED-TV, the more powerful and therefore arguably the more valuable and marketable station, on unreserved Channel 17 as a commercial entity now,<sup>5</sup> but has foregone this opportunity in order to retain noncommercial educational service on Station WNED-TV on Channel \*17. Under our rules, Petitioner could also sell Station WNED-TV and then swap channels with the new licensee and reach the same result that would be achieved by the proposal as filed.<sup>6</sup> However, by retaining Station WNED-TV as a public station on a reserved channel, petitioner preserves Station WNED-TV's service to Buffalo as a noncommercial educational station, and avoids the expensive process that the two-stage filing would require.

9. As additional support for the proposal, the proceeds of the sale of Station WNEQ-TV will fund a trust that will be used to upgrade Station WNED-TV to digital service and thus provide expanded service to the community. Therefore, just as noted in the *Report and Order* in MM Docket No. 85-41 as justification for granting intraband channel exchanges, this exchange would allow noncommercial stations to improve their broadcast services.<sup>7</sup> In addition, just as noted in that *Report and Order*, additional justification is provided by the fact that this exchange will not result in the elimination of any noncommercial channel reservations.

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<sup>5</sup> The defining factor in a station's mode of operation is not its classification as commercial or noncommercial, but rather the designation of its channel as reserved or unreserved. *Memorandum Opinion and Order* in Docket Nos. 8736 et al., 8 RR 469-70 (1952). The unreserved channels can be used commercially or noncommercially, as the licensee sees fit. *Id.* Channel reservations were originally intended to be for a limited period of time, to allow educational institutions additional time to establish operating stations. *Sixth Report and Order in Docket Nos. 8736 et al.*, 41 FCC 148, 159 (1952).

<sup>6</sup> See 47 CFR §1.420(h).

<sup>7</sup> See *Report and Order* in MM Docket 85-41 59 RR2d 1455, 1464 (1986).

10. CNM argues that the Commission should deny petitioner's proposal because it could spark a "flood" of requests by other public broadcasters seeking to sell their second channel public television stations, citing to the *Pittsburgh* situation.<sup>8</sup> CNM expresses concern that so called "second service" stations, which typically cater to smaller audiences, will be lost forever. We note that CNM's concerns are not well founded. First, there is little likelihood that a flood of requests such as this will be successfully filed, since there are only a handful of other pairs of noncommercial educational television stations that are co-owned in communities *and* one station is operating on an unreserved channel, just as in the instant case. These cases differ from situations in which there are two public stations in a market operating on reserved channels. Those would differ from the instant case, as they would require loss of a reserved channel in the community, and thus require a different standard of review.<sup>9</sup>

11. Second, we believe that this proposal can be effectuated in accordance with Section 309 of the Act<sup>10</sup> and our rules without soliciting competing expressions of interest for dereserved Channel 23 for the same reasons as those given when the Commission adopted Section 1.420(h).<sup>11</sup> As stated above, petitioner could have filed this proposal in two stages, the first being a sale of its commercial station, and the second a channel exchange pursuant to Section 1.420(h) of the rules to regain the channel it desires. At the time Section 1.420(h) was adopted, the Commission recognized that it needed to create a process whereby commercial and noncommercial educational television stations could voluntarily exchange channels within the same band without being subjected to competition for their channels. It noted that proceedings initiated by parties proposing channel exchanges would be withdrawn whenever competing expressions of interest were filed against their stations, and thus result in a waste of Commission, public and licensee resources.

12. Furthermore, the Commission noted, as we do here, that in the case of channel exchanges, the rule of *Ashbacker* does not apply because the channels are occupied.<sup>12</sup> As the Court of Appeals affirming the *R&O* in MM Docket No. 85-41 stated:

[T]he *Ashbacker* Court did not address the issue of what circumstances create an "open" frequency triggering the competition requirement. Particularly, the Court never said that the Commission must open a frequency for competing

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<sup>8</sup> See *In the Matter of Deletion of Noncommercial Reservation of Channel \*16, Pittsburgh, Pennsylvania*, 11 FCC Rcd 11700 (1996) ("*Pittsburgh*").

<sup>9</sup> See *Pittsburgh*, at 11708.

<sup>10</sup> See also *Ashbacker v. FCC*, 326 U.S. 327 (1945) in which the Supreme Court held that the Commission could not grant one of two mutually exclusive applications for a broadcast license without affording the other its statutory right to a comparative hearing.

<sup>11</sup> See *Report and Order* in MM Docket No. 85-41, 59 RR 2d 1455 (1986); *aff'd*, *Rainbow Broadcasting Co. v. F.C.C.*, 949 F.2d 405 (1991).

<sup>12</sup> See *Report and Order* in MM Docket No. 85-41, 59 RR 2d 1455 at 1463.

applications whenever it assigns that frequency to a community.... It is reasonable that *Ashbacker* does not compel the FCC to hold comparative hearings in order to approve channel exchanges, as *Ashbacker* does not define "open channel," much less include within the meaning of "open channel" those channels up for exchange.<sup>13</sup>

The Court went on to affirm the Commission's decision to depart from its previous established policy of requiring open competition for frequencies allotted to a community, and to allow intraband channel exchanges without requiring competing expressions of interest for public interest reasons.<sup>14</sup> Specifically, the Court agreed that this approach was rationally based on the same public interest objectives that exist here, the promotion and financing of noncommercial educational television stations.<sup>15</sup>

13. Our determination in this regard is buttressed by the fact that petitioner could have sold Station WNED-TV as a commercial station. In the *R&O* in MM Docket 85-41, the Commission noted that the existing procedures requiring competing expressions of interest allowed for abuse because third parties could express interest merely to block competition. Therefore, as noted in *R&O* in Docket 85-41, while opening Channel 23 to competing applications is theoretically possible, it is not compelled by the Act or our policies, nor is it viable. As noted, experience has shown that the petitioner requesting this proposal would withdraw it if subjected to the possibility of competing expressions of interest for either channel, resources would be wasted and no improvement in service would result from the proposal. Accordingly, we determine that it is appropriate to grant the proposal as filed.

14. With respect to the comments made by parties in opposition regarding alleged misrepresentations made by petitioner, all of the instances cited are taken out of context and have no documentation to verify them. We therefore consider them to be speculative and without merit. With respect to the allegation that public money was used to operate Station WNEQ-TV, any issue of reimbursement will be addressed at the time the station is actually sold, and the licensee will be required to declare and reimburse any grant money received for the benefit of the station at the time of sale. We do note, however, that petitioner has stated that all government funds it received were used to benefit Station WNED-TV and that it did not receive or use any government money exclusively to build or operate Station WNEQ-TV.

15. This action does not remove or add any channel, nor alter the total number of channels in Buffalo which are reserved for noncommercial educational use. No technical changes are involved in this exchange of channel reservation. This modification merely changes the reservation for noncommercial educational use from one channel to another, both

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<sup>13</sup> *Id.* at 410.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

in the Television Table of Allotments and in the DTV Table of Allotments. The exchange therefore, can be made at each station's current site.

16. The Commission believes it would serve the public interest to grant the proposal to simultaneously dereserve Channel \*23 at Buffalo, New York, and reserve Channel 17 for noncommercial use at Buffalo.

Community	Channel No.
Buffalo, New York	2, 4, 7, *17 23, 29, 49

17. We also make the respective amendments to the DTV Table of Allotments, Section 73.622(b), of the Commission's Rules with respect to Buffalo, as follows:

Community	Channel No.
Buffalo, New York	14, 32, 33, 34 38, 39, *43

18. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send by Certified Mail, Return Receipt Requested, a copy of this *Report and Order* to the following:

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19. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the authorizations of Western New York Public Broadcasting Association for Stations WNED-TV and WNEQ-TV, ARE MODIFIED to specify operation on Channel 17\* in lieu of Channel 17 and Channel 23 in lieu of Channel\*23, respectively.

20. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

21. IT IS FURTHER ORDERED, That the proposal filed by Coalition for Noncommercial Media IS DENIED.

22. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

23. For further information concerning this proceeding contact Victoria M. McCauley, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos  
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